IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

J U D G M E N T

1. Smt.Sayra Devi & Ors. v. National Insurance Co. Ltd. and Others.

D.B. CIVIL SPECIAL APPEAL (CIVIL) NO. 4/1997, against the judgment dated 22.2.1996 passed in S. B. Civil Misc. Appeal No.114/88.

2. Smt.Champa Devi & Ors. v. National Insurance Co. Ltd. and Others.

D. B. CIVIL SPECIAL APPEAL (CIVIL)NO.11/1997, against the judgment dated 22.2.1996, passed in S. B. Civil Misc. Appeal No. 192/88.

DATE OF JUDGMENT: 07.04.2006

PRESENT.

HON'BLE MR. JUSTICE RAJESH BALIA
HON'BLE MR. JUSTICE R. P. VYAS

Mr.N.M.Lodha) for Appellants.
Mr.Anil Bhandari,)
Mr.Jagdish Vyas, for Respondents.

BY THE COURT: (PER HON'BLE R.P.VYAS, J.):

Since both the aforesaid appeals arise out of the same Judgment and relate to the same incident, they are, therefore,

decided by this common Judgment.

The facts giving rise to the instant appeals are that Ghewar Chand, Madan Lal, Kishan Lal, Ashok Kumar and Pawan Kumar were going from Jodhpur to Balotra (Pachpadra) on October 31, 1980 in a bus belonging to the Rajasthan State Road Transport Corporation. When the bus reached at village Dhawa, a strike call was given by the Roadways employees and, therefore, the bus did not proceed ahead from Dhawa and left the passengers at Dhawa Bus Stand.

A Jeep bearing Registration No. RJT 340, owned by Pukh Raj, was coming from Jodhpur and was going towards Jasol, stopped at the Bus Stand, Dhawa. A request was made to the owner of the Jeep Pukhraj to give them lift as they will not be able to get some other conveyance. They requested him to leave them at Pachpadra and Balotra respectively. Pukhraj agreed and allowed them to sit in the jeep. After taking these five passengers, the jeep proceeded from Dhawa to Pachpadra and Balotra respectively. After the jeep ran about a kilometer, it was stopped by the driver to check the condition of the engine as the engine was recently repaired. Pukhraj (owner of the jeep) and Pratap (driver of the jeep) came out from the jeep and after checking the engine, went to meet the call of nature, while the

others persons remained sitting in the jeep.

At about 9.30 P.M., a truck, bearing Registration No. RRP 8435, which was being driven by Gurdayal alias Daali rashly and negligently came from Jodhpur side and hit the jeep, as a result of which the jeep overturned and Ghewar Chand, Madan Lal and Bhanwar Lal came beneath the jeep. Ghewar Chand aged 40 years and Madan Lal, aged about 15 years both died on the spot, while Bhanwar Lal was taken to Balotra hospital, where he was declared dead. Kishan Lal, Ashok Kumar and Pawan Kumar also received grievous injuries in this accident. The truck driver did not stop the truck after the accident and ran away from the place of accident.

Legal representatives of deceased Bhanwar Lal did not file any claim petition, whereas, the legal representatives of Ghewar Chand, his widow - Smt.Champa and others filed Claim Petition No.27 of 1982 for grant of compensation of Rs.8,85,000/-. The parents of deceased Madan Lal, viz. Smt.Sayra and Amrit Lal filed Claim Petition No.28 of 1982 for the award of compensation amounting to Rs.2,00,000/-.

During the pendency of the claim petition, Amrit Lal (the father of deceased Madanlal) died and, therefore, his legal

representatives were taken on record.

Ashok Kumar, who received injuries in the accident, also filed Claim Petition No.29 of 1982 for the award of Rs.50,000/- as compensation.

The claimants and the defendants led their respective evidence before the Judge, Motor Accidents Claims Tribunal, Balotra.

The learned Judge, after hearing the submissions of the learned counsel for the parties and examining the documents as well as the evidence led by both of them, passed the Award dated 17.5.1988 and awarded a sum of Rs.6,40,000/- as compensation with interest @ 12% per annum to the claimants Smt. Champa Devi and Others; Rs.2,15,000/- as compensation with interest @ 12% per annum from the date of filing the claim petition to the claimants – Smt.Sayra Devi and Others and Rs.42,000/- as compensation along with interest @ 12% per annum from the date of filing the petition were awarded to the claimant – Ashok Kumar. We are not concerned in these appeals with the last award.

The Insurance Company and the owner of the vehicle as

well as the Transport Company under whose control the truck in question was being driven, filed separate appeals. Out of the nine appeals, three appeals of M/s. Milap Transport Company were rejected as barred by time, award against it became final. The remaining six appeals were heard together. The learned Single Judge partly allowed the appeals, by reducing the amount of compensation in all the three cases.

In D. B. Civil Special Appeal (Civil) No.11/97 arising out of S. B. Civil Misc. Appeal No.192/88 qua Claim Petition No.27/82 by Champa Devi & Others legal representatives of deceased Ghewarchand award was reduced from Rs.6,40,000/- to Rs.1,83,000/- only. Likewise, in D. B. Civil Special Appeal (Civil) No.4/97 arising out of S. B.Civil Misc. Appeal No.114/88 qua Claim Petition No.28/82 by appellant – Sayra Devi, who is the mother of the deceased – Madanlal, was awarded a sum of Rs.2,15,000/- as compensation, but the learned Single Judge reduced the amount of compensation to a sum of Rs.50,000/- only.

Being aggrieved by the judgment dated 22.2.1996, the instant appeals have been preferred before this Court.

About claim of Sayra Devi, mother of deceased Madanlal, it is submitted by the learned counsel for the appellants that the

learned Single Judge was in error in holding that the mother of the deceased Madanlal is entitled to receive a sum of Rs.50,000/- only as compensation, on account of shock and mental agony suffered by her due to death of her son. The appellant led evidence to show that deceased Madanlal was earning Rs.25,000/- per year. Out of Rs.25,000/-, the deceased was spending Rs.15,000/- towards his family, including his mother. But the learned Judge ignored this aspect of the matter by holding that it is only an expectation, which might or might not have been fulfilled. Apart from that, Smt. Sayra Devi was aged about 45 years and the Tribunal held that for 20 years, Shri Madanlal would have given Rs.10,000/- per year to his family members.

It is further submitted by the learned counsel for the appellants that deceased – Madanlal would have earned at least Rs.25,000/- when he would have attained the age of 25 years. His mother would have at least received the monetary help to the extent of Rs.10,000/- to Rs.15,000/- per year. But, the learned Single Judge did not allow any amount on this head. According to the learned counsel for the appellants, since the parents had lost their son of 17 years in the accident, so, Rs.15,000/- awarded by the learned Single Judge is insufficient and inadequate. Learned counsel submitted that the learned

Judge did not take into consideration the future prospects and the high rise in price index.

It is also submitted by the learned counsel for the appellants that the learned Single Judge has not looked into the case in proper perspective and has committed error in holding that the insurance company is only liable to the extent of Rs.50,000/- as, according to the learned Single Judge, its liability is limited.

About claim of Smt.Champa Devi & Others, legal representatives of deceased Ghewar Chand, it is also contended by the learned counsel for the appellants that the learned Single Judge has seriously erred in reducing the award of compensation by taking current income of the deceased to be even less than his last return of income in not considering future prospects of the deceased who was only 40 years of age at the time of death and in adopting multiplier of 12 only with no basis, by ignoring that his legal representatives were not only his aged parents, but included his young widow and children.

It is also contended by the learned counsel for the appellants that the learned Single Judge has fixed Rs.5,000/- as loss of consortium as against Rs.2,00,000/-, awarded by the

learned tribunal. Learned counsel submits that, in fact, the deceased left four minor children and a widowed mother and wife. All the appellants were dependant on the income of the deceased and the deceased was spending a very petty amount on his own personal expenditure. Learned counsel submits that the learned Tribunal was justified in holding that the deceased used to spend Rs.25,000/- per year on his family and the appellants are entitled to get compensation by applying the multiplier of 25. Learned counsel submits that deceased Ghewarchand was an income-tax payer. His assessment orders (Exs.29 to 33) show that he was paying income tax on his income which was disclosed as Rs.31,310/- for the year, 1980-81. Apart from that, he was also an Agent of L.I.C. and had derived income from commission also. According to the learned counsel, the Tribunal found the income of the deceased as Rs.30,000/- per year, whereas, on the contrary to record, the learned Single Judge has wrongly calculated the claim by holding that the deceased was only earning Rs.22,000/- per year and when 1/3rd amount is deducted from his income, the dependency comes to Rs.15,000/- only.

According to the learned counsel for the appellants, the Tribunal was justified in awarding Rs.2,000/- to each of the dependants of the deceased on account of mental agony and

shock etc., whereas the learned Single Judge, has completely ignored this fact without any basis. It may be mentioned that on account of untimely and sudden death of their only earning member, the appellants have suffered a great shock.

It is argued by the learned counsel for the appellants that the learned Single Judge has erred in holding that the Insurance company is only liable to satisfy the claim upto statutory limit. According to the learned counsel for the appellants, while hearing an appeal against the award, the learned Single Judge has acted illegally and erroneously in interfering with the quantum of compensation. It is also argued by the learned counsel for the appellants that the learned Single Judge has not considered the future prospects of the deceased. The learned Single Judge has also not considered the compensation under the heads of consortium and love and affection. In this connection, learned counsel for the appellants has relied on **2004 WLC (UC) 789, 2004 WLC (UC) 791, 2005 (8) RDD 3025, 2005 (10) RDD-4577 and 2005 WLC (UC) 798.**

It is also argued by the learned counsel for the appellants that as per sub-section (2) of Section 149 of the Motor Vehicles Act, 1988 (Section 96 (2) of the Act, 1939), the Insurance Company is entitled to defend the action on the grounds

enumerated in the aforesaid sub-section and no other ground is available to it.

Section 149 (2) reads as under :-

S.149 (2). The insurer shall be entitled to defend the action on any of the following grounds, namely -

(a) that there has been a breach of a specified condition of the policy, being one of the following conditions, namely -

(i) a condition excluding the use of the vehicle -

(a) for hire or reward, where the vehicle is on the date of the contract of insurance a vehicle not covered by a permit to ply for hire or reward, or

(b) for organised racing and speed testing, or

(c) for a purpose not allowed by the permit under which the vehicle is used, where the vehicle is a transport vehicle, or

(d) without side-car being attached where the the vehicle is a motor cycle; or

(ii) a condition excluding driving by a named person or persons or by any person who is not duly licensed, or by any person who has been disqualified for holding or obtaining a driving licence during the period disqualification, or

(iii) a condition excluding liability for injury caused or contributed to by conditions of war, civil war, riot or civil commotion; or

(b) that the policy is void on the ground that it was obtained non-disclosure of a material fact or by a representation of fact which was false in some material particular."

According to the learned counsel for the appellants, the learned Single Judge dismissed the appeals filed by the owner/insured and the two appeals filed by the Insurance Company were partly allowed and the award – amounts were reduced in the appeals filed by the Insurance Company, whereas as per the judgment passed in the case of **National Insurance Company v. Nico-LlettaRohtagi (2002 D.N.J. (S.C.)699),** the appeals filed by the Insurance Company are not maintainable. Thus, both the grounds were not available under Section 149 (2) of the Motor Vehicles Act, 1988 or Section 94 (2) of the Motor Vehicles Act, 1939.

Learned counsel for the appellants pointed out that the column of limits of liability in the Insurance Policy (C 80/2), U/S II-I (i) was blank and U/S II-I (i), the claim for property was mentioned Rs.50,000/-. Thus, according to the learned counsel for the appellants, it is clear that the third party risk was unlimited and for property damage, there was a limited liability of Rs.50,000/-.

Learned counsel for the appellants also pointed out that as per India Motor Tariffs issued by the Tariff Advisory Committee (General Insurance), the premium of truck having carriage capacity of 9 tons was as follows :-

	Town	Mofussil
Premium upto 5 Tons	761	911
Rs.150/- for additional 4 tons.	600	600
Liability of public risk	97	125
	1458	1636

In this context, the learned counsel for the appellants submits that as per the Tariff, the premium of town rate was lesser than the Mofussil area, because Mofussil rates were charged all over India, whereas Town rates were charged for all over India only U/S II-I (i) and for other sections, only Town geographical area was covered. As per the Policy exhibited, the geographical area shown U/S II-I (i) was India and under all other sections, a rubber stamp was affixed and geographical area of 'BHATINDA' was shown. According to the learned counsel, it is clear that the basic premium, including the liability to the public risk was only Rs.1458/-, where the Insurance Company has charged Rs.1511/-. Thus, the Insurance Company has charged the extra premium of Rs.53/-. In this way, the liability of the Insurance Company towards third party is unlimited. In support of his contention, he has relied on the case of **National Insurance Company Ltd. v. Laxmi (2004 WLC (UC) 706).**

Apart from that, there is an avoidance clause in the Policy (below Schedule III), which reads as under :-

> "Avoidance of certain terms and rights of Recovery :
>
> Nothing in this Policy or any endorsement here on shall affect the right of any person indemnified by this Policy or any other person to recover an amounts under or by virtue of the provisions of the Motor Vehicles Act, 1939 (Sec.96). But the insured shall re-pay to the Company allow sums paid by the Company which the Company would not have been liable to pay, but for the said provision."

Thus, the learned counsel for the appellants strenuously submits that in view of the above, for the sake of argument, if it is assumed that the liability of the Insurance Company is limited to the extent of Rs.50,000/-, then also, it is clear from the Policy that the Insurance Company has to pay to the claimants the entire amount awarded by the Claims Tribunal and, thereafter, it can recover the excess amount from the insured. In support of his contention, he has placed reliance on the case of O**riental Insurance Company Ltd. v. Cheru Vakkara Nafeessu, [2004 ACJ-1 (SC)]**, in which their Lordships of the Supreme Court considered the clause in the policy and held that under the insurance policy, the limit of company's liability is only upto Rs.50,000/-, but looking to the avoidance clause, the insurance

company was held liable to pay the entire award amount to the claimants and it was held by their Lordships of the Supreme Court that the insurer can recover the excess amount from the insured by executing this award. Apart from that, in **National Insurance Company Ltd. v. Swaran Singh & Others (2004 ACJ 1),** it was held that the insurance company is liable to make the entire award to the claimants and then they may recover beyond their liability from the insured. In **National Insurance Company Ltd. v. Baljeet Kaur [2004 ACJ-420 (SC)]**, and **Oriental Insurance Company Ltd. v. Nanjappan and Others, [2004 ACJ-721 (SC)],** again, their Lordships of the Supreme Court held that in limited liability, insurance company is liable to the claimants for the entire award amount, but entitled to recover the amount from the insured without filing a suit and insurance company may initiate proceedings before the executing Court. A Division Bench of the Gujarat High Court in **Oriental Fire and General Insurance Company v. Firdosh Parwej Mysorewala (2004 ACJ-257) (Gujarat)** considered the judgment of Constitutional Bench of Hon'ble Supreme Court given in C.M.Jaya's case (Supra) and held that the Constitutional Bench had no occasion to consider the avoidance clause in the insurance policy which is considered in the case of **Amritlal Sood and Oriental Insurance Company v. Cheru Vakkara (2001 ACJ 1).** Applying the principles laid down in the above

referred two decisions of the Hon'ble Supreme Court to the facts and circumstances of the present case and more particularly, the terms and conditions stipulated in insurance policy, the Court was of the opinion that though the liability of the insurance company is limited to the extent of Rs.50,000/- only, the insurance company is liable to pay the entire amount of award to the claimants and upon making such payment, the insurance company can recover the excess amount from the insured by executing the award against the insured to the extent of such excess amount as per Section 96 (4) of the Motor Vehicles Act, 1939. Thus, the Gujarat High Court, after considering all the judgments available on the subject, held that in case of limited liability, the insurance company shall make payment of entire amount of award and after making such payment, the insurance company is entitled to recover the excess amount from the insured. Learned counsel for the appellants pointed out that the Rajasthan High Court in **Ramlal v. Hasti Mal (2005 RAR – 410 (Raj.))**, after considering the five Judges Bench decision given in C.M.Jaya's case (Supra) and all other judgments, held that in the case of limited liability, the insurance company will satisfy the award to the claimants and can recover the excess amount from the insured by execution. There is no reason for depriving the claimant from the benefit of insurance coverage only because of the wrong which was not committed by him.

Once there is a valid contract of insurance, the insurer cannot avoid its liability to pay compensation to third party. If view is taken otherwise, then without there being any fault of the beneficiary and because of fault of insured, the beneficiary will be deprived from his valuable right because of none of his fault. The view, that the insurer shall have initial liability to pay the compensation to claimant even in case where insurer proved his defence to avoid his liability, it will not only be just and proper, but it will sub serve the purpose of the act.

In reply, it is submitted by the learned counsel for the respondents that the judgment of the learned Single Judge is based on sound reasonings and it does not require any inference by this Court. The compensation awarded by the learned Tribunal is highly excessive, looking to the facts and circumstances of this case.

It is further submitted by the learned counsel for the respondents that as per Section 96 of the Motor Vehicles Act, the liability of the insurance company is limited to the extent of Rs.50,000/- and the learned Tribunal has committed an error in holding the Insurance Company to indemnify the whole of the claims. It is submitted by the learned counsel that neither the driver of the truck, nor any other eye witness of the occurrence

has been produced in this case and from the evidence of Pratap, the driver of the jeep, it is established that it was only on account of the rash and negligent driving of the truck by its driver Gurdayal Singh that the accident took place, which resulted in the death of three persons, vix. Ghewar Chand, Madan Lal and Bhanwar Lal and caused injuries to Ashok Kumar etc.

It is also submitted by the learned counsel for the respondents that the insurance company is liable to the extent of its statutory liability in each claim.

According to the learned counsel for the respondents, the statutory liability of the insurance company under Section 95 (2) of the Act, at the relevant time, was Rs.50,000/-. The owner of the vehicle did not pay any extra premium to cover the unlimited liability. Apart from that, the cover note of the insurance company shows that the insurance company accepted the liability to the tune of Rs.50,000/- only. Not only that, but also, no specific agreement was arrived at between the owner and the insurance company to cover unlimited liability. Thus, in the absence of any contract to the contrary, the liability of the insurance company to indemnify the claim is limited to the extent of Rs.50,000/- only. In this view of the matter, the

learned counsel pointed out that the liability of the insurance company has rightly been limited to the extent of Rs.50,000/- along with interest @ 12% per annum by the learned Single Judge.

It is contended by the learned counsel for the National Insurance Company Ltd. - respondents that the vehicle, bearing Registration No. RRK-8435 was insured with the National Insurance Company and is, admittedly, a goods vehicle and the accident took place on 31.10.1980, therefore, the rights and liabilities of the parties are required to be decided on the basis of the Motor Vehicles Act, 1939, as it stood on the date of accident. Apart from that Section 95 (2) (a) provides that where the vehicle is a goods vehicle, the Policy of insurance shall cover liability incurred in respect of any one accident upto the limit of Rs.50,000/- in all. The relevant provision, as it stood on the date of the accident, reads as under :-

> "95 (2) Subject to the provisions to sub-section (1), a policy of insurance shall cover any liability incurred in respect of any one accident upto the following limits, namely -
>
> (a) where the vehicle is a goods vehicle, a limit of fifty thousand rupees in all, including the liabilities, if any, arising under the Workmen's Compensation Act, 1923 (8 of 1923), in respect of the death of, or bodily injury to, employees (other than the driver), not exceeding six in number, being carried in the vehicle."

In support of his aforesaid submissions, the learned counsel for the respondents – National Insurance Company Ltd. has relied on the case of **National Insurance Co. Ltd., New Delhi v. Jugal Kishore & Others (AIR 1988 SC 719),** in which it was observed that even though it is not permissible to use a vehicle, unless it is covered at least under an "act only" policy, it is not obligatory for the owner of a vehicle to get it comprehensively insured. In case however, it is got comprehensively insured a higher premium than for an "act only" policy is payable depending on the estimated value of the vehicle. Such insurance entitles the owner to claim reimbursement of the entire amount of loss or damage suffered up to the estimated value of the vehicle calculated according to the rules and regulations framed in this behalf. Comprehensive insurance of the vehicle and payment of higher premium on this score, however, do not mean that the limit of the liability with regard to third party risk becomes unlimited or higher than the statutory liability fixed under sub-section (2) of Section 95 of the Act. For this purpose, a specific agreement has to be arrived at between the owner and the insurance company and separate premium has to be paid on the amount of liability undertaken by the insurance company in this behalf. Likewise, if risk of any other nature for instance, with regard to the driver

or passengers etc. in excess of statutory liability, if any is sought to be covered it has to be clearly specified in the policy and separate premium paid therefor.

Learned counsel for the respondents – National Insurance Company Ltd., while pointing out that in case of the Insurance Company not taking any higher liability by accepting a higher premium for payment of compensation to a third party, the insurer would be liable to the extent limited under Section 95 (2) of the Act and would not be liable to pay the entire amount, has relied on the Five Judges Bench Judgment delivered in the case of **New India Assurance Co. Ltd. v. C.M.Jaya and Others [(2002) 2 SCC 278].** In that case, the Larger Bench held that the liability of the insurer is limited, as indicated in Section 95 of the Act, but it is open to the insured to make payment of additional higher premium and get higher risk covered in respect of third party also. But, in the absence of any such clause in the insurance policy, the liability of the insurer cannot be unlimited in respect of third party and it is limited only to the statutory liability.

Learned counsel for the respondents – National Insurance company Ltd. also relied on the case of **National Insurance Col Ltd. v. Keshav Bahadur and Others (2004) 2 SCC 370**,

in which it was held by their Lordships of the Supreme Court that the liability of the insurer is limited as indicated in Section 95 of the Act. But it is open to the insured to make payment of additional higher premium and for the insurer to accept higher risk covered in respect of third party also. But, in the absence of any such clause in the insurance policy, and proof of payment of additional premium, the liability of the insurer cannot be unlimited in respect of third party and it is limited only to the statutory liability. It was also held that even if a vehicle is the subject-matter of comprehensive insurance unless a higher premium is paid on that score, limits of the liability with regard to third-party risk do not become unlimited or higher beyond the statutory liability fixed. For this purpose, a specific agreement has to be arrived at between the insured and the insurer and separate premium has to be paid in respect of additional amount of liability undertaken by the insurer in that regard.

While relying on the case of **National Insurance Co. Ltd. v. Bommithi Subbhayamma and Others [2005 ACJ 721 (SC)]**, learned counsel for the respondents – National Insurance Co. submitted that the claimants can recover the awarded compensation from the owner of the vehicle and the insurance company is not liable to make the entire payment to the claimants.

Lastly, learned counsel for the respondents – National

Insurance Company Ltd. has relied on the case of **National Insurance Co. Ltd. v. Prembai Patel & Others (2005 (1) WLC (SC) P.751),** in which it was held by their Lordships of the Supreme Court that the Insurance Policy being in the nature of a contract, it is permissible for an owner to take such a policy whereunder the entire liability in respect of the death of or bodily injury to any such employee as is described in sub-clauses (a), or (b) or © of proviso (i) to Section 147 (1) (b) may be fastened upon the insurance company and the insurance company may become liable to satisfy the entire award. However, for this purpose, the owner must take a policy of that particular kind for which he may be required to pay additional premium and the policy must clearly show that the liability of the insurance company in case of death of or bodily injury to the aforesaid kind of employees is not restricted to that provided under the Workmen's Compensation Act.

Learned counsel for the respondents – National Insurance Co. Ltd. , by way of written arguments, submitted that the Insurance Company has preferred the appeal on the ground that the liability of the Insurance Company is limited to the extent of Rs.50,000/- only as per Section 95 of the Act of 1939. The owner had preferred separate appeals, challenging quantum. Therefore, it is not correct to say that the insurance company

has preferred the appeal challenging the quantum. The question of quantum was liable to be considered in owner's appeal. Hence appeals by Insurance Company were not incompetent which were confined to limit of its liability.

With respect to tariff premium, it is submitted by the learned counsel for the respondents – National Insurance Co. Ltd. that tariff premium amounting to Rs.911 + ½% Insured Estimated Value (I.E.V.) was payable upto 5 tonnes and Rs.150/- were payable for each additional tonne. According to the learned counsel for the respondents, the said vehicle was insured against the carrying capacity of 9 tonnes, therefore, the company has charged Rs.911 + 150 x 4 = Rs.1511/-. He submits that the Insurance Company has not charged any additional premium in order to undertake the higher liability than the statutory limit of Rs.50,000/-. It is also submitted by the learned counsel for the respondents – National Insurance company Ltd. that if it is presumed that the Insurance Company has charged Rs.1511/- against the premium of Rs.1458/-, then too, this excess amount (Rs.53/-) cannot be adjusted so as to cover the unlimited liability, because the acceptance of any amount cannot be adjusted, as no specific agreement was arrived at between the Insurer and the insured by accepting the additional premium. Thus, according to the learned counsel for the National Insurance Co. , the liability of the Insurance Company is limited to the

extent as provided under Section 95 (2) (a) of the Act, 1939. Apart from that, since the appellants have neither raised such questions before the learned Single Judge, nor before the Tribunal, therefore, now, for the first time, they (the appellants) are not entitled to raise these questions before this Court.

With regard to the case **National Insurance Company v. Laxmi (2004 WLC, UC P.706)** relied on by the appellant, it is submitted by the learned counsel for the respondents that this authority is not applicable to the facts and circumstances of the instant case as, in that case, in paras 10 and 22, it was categorically held that the Insurance Company has charged additional premium towards public risk and its liability towards the third party is unlimited, whereas, in the present case, according to the learned counsel for the respondents, no such additional premium was charged by the company to undertake the higher liability than the statutory limit of Rs.50,000/-.

We have heard both the learned counsel for the parties and perused the respective authorities relied upon by them.

It is admitted position that the jeep in question was parked by the driver at left side and that took on 'kuchcha' road, by leaving 12ft. Road for incoming and outgoing vehicles. It is also admitted fact that truck No.RRK 8435 was being driven by the

driver – Gurdayal Singh @ Dali rashly and negligently, which hit the jeep, causing instantaneous death of two persons, namely, Ghewar Chan and Madanlal, while the third one – Bhanwarlal died in the way, taking him to Balotra. Apart from that, Kishanlal, Ashok Kumar and Pawan Kumar sustained serious injuries. It is also admitted position that after hitting the jeep, the truck driver ran away from the place of occurrence along with the truck. Thus, looking to the facts and circumstances of the case, the learned Tribunal has awarded a claim of Rs.6,40,000/- in favour of Smt.Champa Devi w.e.f. 13.5.1981, i.e., the date of filing the claim petition along with interest at the rate of 12% per annum. On account of comprehensive policy, the insurance company has been held liable in each case to indemnify the entire amount to the owner of the vehicle in question.The claimed amount has been disbursed like that Smt.Champa Devi would be entitled to get Rs.3,00,000/- and the remaining claimants would be entitled to get the equal amount. That amount would be paid to each claimants, in addition to the amount awarded for loss of consortium. Smt.Sayra Devi would be entitled to get the award of Rs.2,15,000/- along with interest at the rate of 12% per annum w.e.f. 13.5.1981. On account of being comprehensive policy, insurance company has been held liable by the learned Tribunal to indemnify the amount award to the owner of the vehicle. Smt.Sayra Devi would be entitled to

get the amount of Rs.5,000/- as a loss of consortium and the other claimants would be entitled to get Rs.2,000/- in the same head. The claim of Ashok Kumar was also allowed by the Tribunal and non-claimants were held responsible jointly and severally to pay a sum of Rs.42,000/- along with interest at the rate of 12% per annum w.e.f. 13.5.1981.

So far as D.B.Civil Special Appeal No.4/1997 (Smt.Sayra Devi & Others v. National Insurance Co. Ltd. & Others) is concerned, it may be noticed that the principal reason for reducing the compensation awarded by the Tribunal was that father of the deceased had died during the pendency of proceedings and, therefore, no compensation was awardable qua father or his legal representatives. Hence to that extent, amount of compensation was reduced. We are of the opinion that this approach of the learned Single Judge is erroneous. Merely because claimant died during the pendency of the application, his survivors do not lose the right to pursue and claim the compensation as on the date of application. This is supported by provision for allowing interest from the date of application. Further, whether the claimant is one or more does not affect the total sum to be awarded as compensation. The compensation in the circumstances remains one sum to be distributed amongst all the claimants, if the are more than one.

The question of apportionment is not relevant, while considering what compensation is to be awarded.

It may pointed out that the claimants claimed an amount of Rs.2,00,000/- in the claim petition No.28/1982 (Sayra Devi & Others v. Gurdayal Singh & Others), filed before the Claims Tribunal. According to the claimants, deceased Madan Lal was a good, brilliant and talented student, studying in Class IX. The normal age in their family is 70 to 75 years and after attaining the majority and completing the education, the deceased would have served the family at least for a period of twenty years. The claimants claimed before the Tribunal Rs.1,00,000/- on account of loss of dependency from the business and Rs.1,00,000/- on account of shock and mental agony suffered by them. Madanlal was inducted in the cloth business and was said to be earning Rs.25,000/- per year from the business and would have given Rs.10,000/- per year to the family for 20 years. His mother and father sustained shock and mental agony due to the death of Madan Lal. It was also stated that due to the shock of Madanlal, his father dies on 18.09.1981. Thus, the learned Tribunal awarded a sum of Rs.2,00,000/- to Smt.Sayra Devi W/o. Amritlal and the remaining applicants – Kantilal, Shantilal, Rajendra, Smt.Prafulla D/o. Smritlal, Kum. Shantosh were awarded Rs.2,000/- each along with Rs.5,000/- to Smt. Sayra, according to the decision of the Rajasthan High Court in

Gavantkaur's case. Thus, a total sum of Rs.2,15,000/- along with 12 per cent interest from the date of filing the claim petition till the date of realisation was awarded by the Claims Tribunal.

Apparently, the Tribunal has also erred in awarding compensation at a sum larger than claimed and application of 20 as multiplier was also highly excessive. To such extent, the award of Rs.2,15,000/- was excessive, but reduction of such amount to Rs.50,000/- only is also too inadequate.

In the appeal, the learned Single Judge reduced the amount from Rs.2,15,000/- to Rs.50,000/- in respect of Sayra Devi and held that since Amritlal died during the pendency of the claim petition, his legal representatives are not entitled for any compensation. However, an amount of Rs.50,000/- on all counts will be sufficient to justify the claim of claimant Smt. Saya Devi. The learned Single Judge also held that the amount of Rs.2,15,000/- awarded by the trial Court is highly excessive which deserves to be reduced from Rs.2,15,000/- to Rs.50,000/- along with interest @ 12% from the date of filing of the claim petition. The learned Single Judge further also observed in his judgment that it is only Smt. Sayra Devi, the mother of deceased – Madan Lal, who will be entitled for this amount of compensation and interest and as the statutory liability of the insurance company to indemnify the claim, at the relevant time, was Rs.50,000/- along with interest, therefore, the insurance

company along with the other respondents, will be jointly and severely liable to make payment of this amount of compensation along with the interest.

The deceased was bright boy of 17 years with bright prospect. Had the accident taken place post amendment in MV Act by inserting Schedule, the assumed income could have been assessed in the absence of any income to be Rs.15,000/- p.a. and the formula compensation would have been about Rs.2.75 lakhs. In the present case, the deceased was already inducted in the business and was earning about Rs.25,000/- p.a. Even if it is taken to be exaggerated, we may safely confine it to Rs.15,000/- p.a. looking to the period when accident took place, the amount of shock and agony suffered by parents losing their only son.

Thus, an award of Rs.1,70,000/- along with 12% interest from the date of filing the claim petition till realisation of the amount, would have been just and fair determination. Reduction of amount to Rs.50,000/- by the learned Single Judge was not justified. In this view of the matter, the quantum of compensation (Rs.50,000/-) awarded by the learned single Judge is enhanced to Rs.1,70,000/-.

With regard to D. B. Civil Special Appeal No.11/1997 (Smt. Champa Devi & Others v. National Insurance Co. Ltd. & Others), it is pertinent to observe here that deceased – Ghewar

Chand was a trader Industrialist and the main partner in the firm as well as an Insurance Agent for the last twenty years at Balotra. As per his Return of Income submitted in the year, 1981, his annual income was over Rs.31,000/-. The accident took place in the year, 1981. Thus, in these circumstances, the amount of Rs.2,50,000/- as loss of income to claimant as determined by the MACT cannot be said to be excessive so as to warrant interference in that finding. However, multiplier of 25 years applied to the said income appears to be excessive. Looking to longevity of life of his parents and adverse expectancy of life, a multiplier of 16 appears to be justified. Hence, an amount of Rs.4,00,000/- is a just amount of compensation on account of loss of income. Rs.30,000/- is considered as a just and fair amount on account of shock suffered, mental agony and for the loss of consortium, love and affection and expenses in relation to funeral rituals and customary rites.

Thus, in our opinion, an award of Rs.4,30,000/- would have been just and fair determination. Reduction of compensation awarded to legal heirs of Ghewar Chand to an amount less than this by the learned Single Judge was not justified. Hence, quantum of compensation awarded by the learned Single Judge is enhanced to Rs.4,30,000/- with 12% interest from the date of filing the claim petition till realisation, which restricts the reduction in amount of compensation

awarded by the MACT to the aforesaid sum.

With regard to the limits of liability of insurance company, under Sections 95 (2) and 96 (4) of the Motor Vehicles Act, 1939 (Section 149 (5) of the Motor Vehicles Act, 1988), we are inclined to accept the contention of the Insurance Company that no additional amount was paid to Insurance Company as premium to undertake unlimited liability to indemnify the insured against third party risk.

In view of the facts and circumstances of the case and in the light of the aforesaid authorities discussed in earlier stage of this judgment, we may observe that under the insurance policy, the limit of company's liability in respect of any one claim or series of claims arising out of one event is Rs.50,000/- only. But, the avoidance clause of the Policy provides that nothing in this policy shall affect the right of any person indemnified by this policy or any other person to recover an amount under or by virtue of the provisions of Section 96 of the Motor Vehicles Act, 1939. However, the insured shall repay to the company all sums paid by the company which the company would not have been liable to pay but for the said provisions of the Act. The above clause does not enable the insurance company to resist or avoid the claim made by the claimant. The clause will arise for consideration only in a dispute between the insurer and the

insured. The question whether under the said clause, the insurer can claim repayment from the insured is left open. As per avoidance clause in the insurance policy, the insurance company was liable to indemnify the whole extent of liability towards the claimant notwithstanding the limit of liability of the insurance.

The Act contemplates the possibility of the policy of insurance undertaking liability to third parties providing such a contract between the insurer and the insured, that is, the person who effected the policy, as would make the company entitled to recover the whole or part of the amount it has paid to the third party from the insured. The insurer thus acts as security for the third party with respect to its realising damages for the injuries suffered, but vis-a-vis the insured, the company dos not undertake that liability or undertake it to a limited extent. It is in view of such a possibility that various conditions are laid down in the policy. Such conditions, however, are effective only between the insured and the company, and have to be ignored when considering the liability of the insurance company to third parties.

We may also observe that in the absence of payment of additional premium as well as specific agreement executed between insured and insurer, liability of the Insurance Company is limited to the extent of Rs.50,000/- only, but looking to the facts and circumstances of the instant case, particularly the

avoidance clause in the Policy itself, the Insurance Company is liable to pay the entire amount of award to the claimants. However, the Insurance Company can recover the excess amount from the insured by executing the award against the insured to the extent of the excess amount paid by the Insurance Company. It is amply clear from the avoidance clause as well as the terms and conditions stipulated in the Policy that the Insurance Company has to pay to the claimants the entire amount and, thereafter, it can recover the excess amount from the insured by execution. There is no reason for depriving the claimants from the benefit of insurance coverage only because of the wrong which was not committed by him. Once there is a valid contract of insurance, the insurer cannot avoid its liability to pay compensation to the third party.

It is pertinent to observe that the contract between the insured and the company may not provide for all the liabilities which the company has to undertake vis-a-vis the third parties, but in view of the avoidance clause and the provisions of the Act, once the company has undertaken liability to third parties incurred by the persons specified in the policy, the third parties' right to recover any amount under or by virtue of the provisions of the Act is not affected by any condition in the policy.

Looking to the facts and circumstances of the case and

more particularly, the terms and conditions stipulated in the insurance policy as well as the avoidance clause, we are of opinion that though the liability of the insurance company is limited to the extent of Rs.50,000/- only in respect of each claim, but the insurance company is liable to pay the entire amount of award to the claimants as mentioned above and upon making such payment, the insurance company can recover the excess amount from the insured by executing the award against the insured to the extent of such excess amount. Thus, despite the liability of the insurance company being limited, it (the insurance company) shall make payment of the entire amount of award and after making such payment, the insurance company can recover the excess amount from the insured by execution.

Consequently, both the appeals are partly allowed. The judgment of the learned Single Judge dated 22.02.1996 as well as the award dated 17.05.1988 passed by the Judge, Motor Accidents Claims Tribunal, Balotra stand modified as indicated above.

(R.P.VYAS), J. (RAJESH BALIA), J.

scd.